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DePaul Business and Commercial Law Journal

Volume 9
Issue 1 *Fall 2010*

Article 5

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Touchdown for the Union: Why the NFL Needs an Instant Replay in *Williams v. NFL*

*Jaime Koziol**

I. INTRODUCTION

Football holds a unique place in American culture. The 2010 Super Bowl was the top-rated telecast in history, with over 106 million viewers tuning in to see the New Orleans Saints beat the Indianapolis Colts.[1] However, not many of the those viewers know the inner-workings and behind-the-scenes dealings that take place between the National Football League ("NFL") and the professional football players. It is precisely these dealings – the ones that allow for fun Sunday afternoons and thrilling Monday nights – that the Eighth Circuit has interpreted in a troublesome way, resulting in an unequal playing field between NFL teams.

The entire 2009-10 NFL season was largely impacted by two teams: the New Orleans Saints and the Minnesota Vikings. It is unlikely that either team would have been as successful if they had lost any premier players for the first four weeks of the season. However, Saints defensive ends Will Smith and Charles Grant, Saints running back Deuce McAllister, and Vikings defensive tackles Pat Williams and Kevin Williams were all supposed to serve four-game suspensions after testing positive for a banned diuretic in December 2008; the suspensions have not been served. Instead, Smith had a career-high thirteen sacks, Grant and McAllister led their team to a Super Bowl title, and both Pat and Kevin Williams helped the Vikings make the playoffs. The drawn-out legal battle over the suspensions paid off for the two teams, but has ultimately left the NFL as a loser.

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1. David Bauder, *Super Bowl 2010 Ratings: 106 Million Watch, Top-Rated Telecast EVER*, HUFFINGTON POST (Feb. 8, 2010), http://www.huffingtonpost.com/2010/02/08/super-bowl-2010-ratings-m_n_453503.html.

The five respective Vikings and Saints players tested positive for bumetanide, a diuretic contained in StarCaps,[2] which is banned by the NFL because it can be used to mask the presence of steroids. In response to their positive test, the players were each suspended for four games in an arbitration proceeding, pursuant to the NFL's anti-doping policy ("Policy").[3] How this punishment was enforced is a different story. Here, the five players, who all violated the same provision of the Policy,[4] received different punishments. The NFL now faces a serious problem of inequity, since the Saints players will be suspended for four games,[5] while the Vikings players might not be suspended at all because of Minnesota state law.

The Eighth Circuit dealt a blow to the NFL's drug-testing Policy by holding that the NFL's collective bargaining agreement ("CBA") with the NFL Players Association ("the Union") did not prevent the Minnesota players from challenging the NFL's drug-testing regime under Minnesota state laws. *Williams v. NFL*[6] muddies the water about the relationship between state statutory drug testing laws and the policies contained and bargained for in CBAs between employers and employees. The Eighth Circuit decision that Minnesota laws were not preempted by Section 301 of the Labor Management Relations Act ("LMRA")[7] threatens the competitive balance by which the NFL is

2. Millard Baker, *Diuretic Bumetanide Used by NFL Players to Mask Anabolic Steroid Use?*, STEROID REPORT (Oct. 26, 2008, 9:52 AM), http://www.steroidreport.com/2008/10/26/bumetanide-used-by-nfl-players-to-mask-anabolic-steroid-use/ (StarCaps by Balanced Health Products is a dietary supplement marketed for weight loss that contains bumetanide).

3. COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION, art. XLIV § 6(b) (2009), *available at* http://www.docstoc.com/docs/20343876/NFL-Collective-Bargaining-Agreement-2006-2012.

4. Williams v. NFL, 582 F.3d 863, 868 (8th Cir. 2009) (the Policy bans NFL players from using a number of Prohibited Substances including blocking or masking agents, such as diuretics or water pills, which have been used in the past by some players to reach an assigned weight. The Policy adopts a rule of strict liability under which players are responsible for what is in their bodies and explains that a positive test result will not be excused because a player was unaware he was taking a prohibited substance.).

5. The state of Louisiana has a statute that regulates workplace drug testing that is very similar to Minnesota. The Louisiana statute, however, provides for an exemption for the NFL. As a result, the three players from the New Orleans Saints are eligible to serve their four-game suspension imposed by the NFL pursuant to league policy.

6. 582 F.3d at 873.

7. Labor Management Relations Act § 301, 29 U.S.C. § 185(a) (2006). The LMRA protects the rights of workers to unionize and establishes a national policy, favoring arbitration, rather than litigation, to resolve disputes between labor and management. Section 301, is by its terms, simply a grant of jurisdiction to the federal courts to adjudicate challenges to arbitrators' rulings and other questions, but the Supreme Court has long construed Section 301 as also having substantive effect: It preempts lawsuits based on state law that either rely directly on a CBA or indirectly require the interpretation of a CBA. *See* Michael C. Dorf, *Football and Federalism: A*

characterized, and – on a larger scale – strips employers of their power to collectively bargain with employees.

This Note uses precedent, theories, and policy to argue that the Eighth Circuit's decision in *Williams* should be reversed. Part II of this Note explores the federal preemption doctrine, and the background of the doctrine in terms of case law and legislative intent.[8] Part III will discuss the *Williams* opinion.[9] Part IV will argue that preemption of Section 301 of the LMRA was compelled by applicable Supreme Court authority and is especially appropriate in the *Williams* case.[10] Moreover, Part IV argues that the Eighth Circuit's opinion will leave professional sports leagues subject to a patchwork of disparate state laws and regulations, specifically jeopardizing the integrity of professional sports' uniform drug testing programs.[11] Part V then elaborates on the devastating implications that the Eighth Circuit decision will have on collective bargaining in the general Union setting and the effects that undermining CBAs will have on professional sports.[12] Part VI proposes and explores several solutions.[13] Lastly, in Part VII, this Note concludes that because of the ramifications of the decision, the Eighth Circuit's holding should be reversed.[14] Further, in order to prevent players from using state laws to challenge drug suspensions, the Supreme Court should hold that the NFL's drug policies trump state law.[15]

II. BACKGROUND

For over fifty years, courts have interpreted Section 301 of the LMRA, the federal preemption doctrine, and proffered different tests to determine when state laws are trumped by federal law Section 301. These principles made their way to the forefront of the debate in *Williams*.[16] This part first discusses Section 301, then traces various precedents and considers legislative intent when examining the Section 301 doctrine. This section will then discuss Section 301 in the professional sports arena and explain the importance of both uniform

Case Centers on NFL Drug Testing, FINDLAW (Sept. 23, 2009), http://writ.news.findlaw.com/dorf/20090923.html.

8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part IV.
12. *See infra* Part V.
13. *See infra* Part VI.
14. *See infra* Part VII.
15. *See infra* Part VII.
16. Williams v. NFL, 582 F.3d 863, 874 (8th Cir. 2009).

anti-doping codes. Finally, it will stress the importance of judicial deference to arbitration decisions.

A. *Supreme Court Interpretation of Section 301*

The Eighth Circuit in *Williams*[17] held that Section 301 of the LMRA did not preempt Minnesota state laws.[18] Section 301 of the LMRA states that "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties."[19] In other words, this doctrine applies to suits for breaches of CBAs,[20] including the CBA entered into between the Union[21] and the National Football League Management Council ("NFLMC") that is at issue in *Williams*.[22] The Supreme Court has recognized that, in enacting Section 301, Congress intended doctrines of federal labor law to uniformly prevail over inconsistent state rules.[23]

The subject matter of Section 301 demands uniform judicial application of the law.[24] The Supreme Court explained that:

> [T]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to

17. *Id.* at 868.

18. Labor Management Relations Act § 301, 29 U.S.C. § 185(a) (2006).

19. *Id.*

20. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 457 (1957) (interpreting the language of Section 301 to mean that federal courts are authorized by Congress to create a body of federal common law for the enforcement and resolution of dispute arising out of CBAs).

21. The National Football League Players Association, or NFLPA, is the labor union of players in the National Football League. It was founded in 1956, and it achieved recognition as a collective bargaining unit in 1968. About Us, NFL PLAYERS, http://www.nflplayers.com/about-us/ (last visited Oct. 28, 2010).

22. *Williams*, 582 F.3d at 868 (on March 8, 2006, the National Football League Management Council (NFLMC), which is the sole and exclusive bargaining agent of the member clubs, and the Union entered into the NFL Collective Bargaining Agreement 2006-2012).

23. Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962) (holding that a suit in state court alleging a violation of a provision of a labor contract must be brought under § 301 and resolved by reference to federal law. Therefore, a state law that purports to define the meaning or scope of a term in a contract suit is preempted by federal labor law.).

24. *Id.* at 103-04 (explaining why the meaning given to terms in collective-bargaining agreements must be determined by federal law).

> contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract.[25]

The Supreme Court articulated a test for Section 301 preemption in *Allis-Chalmers Corp. v. Lueck*,[26] the leading case in the area of federal preemption.[27] There, an employee brought a state tort action against his employer and insurer, alleging bad faith handling of his disability insurance claim, even though the CBA incorporated the self-funded disability plan and established a grievance and arbitration procedure.[28] The Supreme Court held that the state-law right was grounded in the CBA and was therefore preempted.[29] The case articulated a new test for Section 301 preemption: the analysis must focus on whether a state claim "is inextricably intertwined with consideration of the terms of the labor contract . . . and when resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement . . . that claim must [ ] be treated as a Section 301 claim."[30] A variation of this test would be used almost twenty-five years later in *Williams*.[31]

In the most recent Supreme Court case regarding Section 301 preemption, *Lingle v. Norge Division of Magic Chef, Inc.*,[32] the Court expanded on the test laid out by Justice Blackmun in *Lueck* by preempting all state law claims that are dependent upon analysis of a CBA.[33] The basic theory is that the "application of state law . . . might lead to inconsistent results since there could be as many state-law principles as there are States."[34] Justice Stevens determined in *Lingle* that the uniform interpretation of CBAs promotes the peaceable, consistent resolution of labor-management disputes.[35]

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25. *Id.*

26. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

27. Madison C. Jellins, *Section 301 and Random Drug Testing by Employers: Are California State Constitutional Claims Preempted?*, 23 U.S.F. L. REV. 221, 227 (1989).

28. *Lueck*, 471 U.S. at 204.

29. *Id.* at 220.

30. *Id.*

31. Williams v. NFL, 582 F.3d 863, 874 (8th Cir. 2009).

32. Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 406 (1988).

33. *Id.* at 406 (holding that a plaintiff's state-law claim of retaliatory discharge for filing a workers' compensation claim against her employer is not preempted, as it did not require interpretation of the CBA because the tort of retaliatory discharge for filing a workers' compensation claim is recognized by state law).

34. *Id.*

35. *Id.* at 404 (emphasizing that the primary rationale for Section 301 is to ensure the uniform interpretation of collective bargaining agreements).

B. *Section 301 in the Professional Sports Arena*

Federal preemption has historically been a formidable hurdle for the NFL to tackle in defending itself against state tort claims brought by its member athletes.[36] The scope of the preemption doctrine in the context of major professional sports was addressed in *Stringer v. NFL*.[37] There, a Minnesota Vikings player died of heatstroke at summer training camp.[38] Subsequently, his widow brought a wrongful death/survivorship action and class action complaint for injunctive relief against the NFL.[39] According to the widow, the NFL breached its duty to NFL players by failing "to use ordinary care in overseeing, controlling, and regulating practices, policies, procedures, equipment, working conditions and culture of the NFL teams, including the Vikings, to minimize the risk of heat-related illness."[40] The NFL argued that the widow's claim should be dismissed, because it was preempted by Section 301 of the LMRA.[41] The federal district court, using a similar analysis that the Eighth Circuit now adopts,[42] held that the wrongful death claim against the NFL was preempted because its resolution required interpretation of the terms of the CBA.[43]

In so holding, the district court articulated a two-part test to determine whether a state-law tort claim is sufficiently independent to survive the Section 301 preemption.[44] First, "[a] court must ascertain whether the right claimed by the plaintiff is created by the CBA or by state law."[45] This requires a court to look at how the claim came into being; meaning, "is the CBA the source of the duty allegedly violated?"[46] If that question is answered affirmatively, the claim will be preempted by Section 301.[47] If the plaintiff's claim is not grounded in the terms of the CBA, the court will determine "whether proof of the state law claim requires interpretation of CBA terms."[48] The court

36. Timothy Davis, *Tort Liability of Coaches For Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers*, 76 UMKC L. REV. 571, 588 (2008).

37. Stringer v. NFL, 474 F. Supp. 2d 894 (S.D. Ohio 2007).

38. *Id.* at 898.

39. *Id.*

40. *Id.* at 899.

41. *Id.*

42. *See* Bogan v. Gen. Motors Corp., 500 F.3d 828, 832 (8th Cir. 2007) (holding that a state claim for intentional infliction of emotional distress was not preempted by the LMRA, because consideration of the claim did not require review of the CBA).

43. *Stringer*, 474 F. Supp. 2d at 909.

44. *Id.* at 900.

45. *Id.*

46. *Id.* at 904.

47. *Id.* at 903.

48. *Stringer*, 474 F. Supp. 2d at 900.

will look to see if resolution of the state law claim is substantially dependent upon or inextricably intertwined with an analysis of the CBA. If so, the claim will be preempted.[49]

In the past, the Eighth Circuit has provided guidance on federal preemption, and has applied a similar analysis to *Stringer* in order to determine if a claim is sufficiently "independent" to survive Section 301 preemption.[50] First, a state-law claim is preempted if it is based on a provision of the CBA, meaning that the CBA provision at issue actually sets forth the right upon which the claim is based.[51] Second, a state-law claim is preempted where the claim is dependent upon an analysis of the relevant CBA, meaning that the plaintiff's state-law claim requires interpretation of a provision of the CBA.[52] The court in *Williams* applied this test to hold that the state law claims are not dependent on analysis of the CBA, and thus are not preempted by Section 301.[53]

The NFL has been a defendant in another preeminent case, *Holmes v. NFL*,[54] which illustrates how Section 301 often prevents athletes from succeeding on state law claims. In *Holmes*, an athlete tested positive to a drug test given by his team, the Detroit Lions, pursuant to the NFL's drug-testing program.[55] That program was established under the NFL CBA.[56] After the positive drug test, the athlete involuntarily enrolled in the NFL's drug program and was suspended from four games without pay. Then, he brought suit alleging that the imposed punishment mandated by the NFL CBA violated his due process rights.[57] The court held that the underlying labor dispute concerning the propriety of Holmes's enrollment in the drug program

49. *Id.*

50. Bogan v. Gen. Motors Corp., 500 F.3d 828, 832 (8th Cir. 2007).

51. *Id.*

52. *Id.*

53. Williams v. NFL, 582 F.3d 863, 874 (8th Cir. 2009).

54. Holmes v. NFL, 939 F. Supp. 517 (N.D. Tex. 1996).

55. *Id.* at 520.

56. *Id.* The NFL's Drug Program was adopted as part of the collective bargaining process between the Management Council and the NFLPA. The Drug Program is a three-stage program designed to treat and/or discipline players with substance abuse problems. Stage 1 involves a preliminary medical evaluation and, if necessary, treatment for players who enter the program through a positive drug test. A player who is referred to Stage 1 by reason of a positive drug test advances to Stage 2, where he becomes subject to unannounced drug testing conducted by the program's Medical Advisor. A player who tests positive for drugs while in Stage 2 is subject to discipline that includes a fine of four weeks' regular season pay. A player who tests positive a second time during Stage 2 faces a four-game suspension without pay, and advances to Stage 3. A positive drug test in Stage 3 results in banishment from the NFL for a period of at least one calendar year.

57. *Id.*

could not be separated from his state tort and contract claims, and thus the claims were preempted by the LMRA.[58]

As *Stringer* and *Holmes* illustrate, athletes typically have a difficult time asserting state claims against their respective teams and the NFL. Athletes pursuing claims against professional teams and programs have not fared well in the instances in which courts have examined the applicability of preemption to claims premised on state law.[59] This background set the stage for the *Williams* decision. This article will explain how the Eighth Circuit applied the appropriate test in a new way, straying from years of precedent, resulting in a shocking and harmful result to the NFL and employers.

C. *The Importance of Uniform Anti-Doping Codes*

It is imperative to address the importance of uniform anti-doping codes before critiquing the *Williams* decision. In *Williams*, the Union entered into a CBA with the NFLMC that expressly incorporated the Policy on anabolic steroids and related substances.[60] This Policy is similar to other anti-doping codes in that both operate in such a way to require nationwide enforcement and uniformity.[61] Doping is prohibited in part because it is believed that certain drugs allow players and athletes to have an unfair competitive advantage over other non-doping athletes.[62] In an effort to promote a level playing field, with some exceptions, players must abide by the rules to play.

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58. *Holmes*, 939 F. Supp. at 527.

59. Davis, *supra* note 36, at 588.

60. Williams v. NFL, 582 F.3d 863, 869 (8th Cir. 2009) (the CBA provides that "all players, Clubs, the Union, and the NFL and the NFLMC will be bound hereby . . . ." The Policy is conducted under the auspices of the NFLMC. It bans NFL players from using a number of Prohibited Substances including blocking or masking agents, such as diuretics or water pills, which have been used in the past by some players to reach an assigned weight. The policy adopts a rule of strict liability under which players are responsible for what is in their bodies and explains that a positive test result will not be excused because a player was unaware he was taking a prohibited substance.).

61. *See* UNITED STATES ANTI-DOPING AGENCY, http://www.usada.org/about (last visited Sept. 29, 2010). The United States Anti-Doping Agency administers the anti-doping code for the Olympics. The USADA and NFL policy both prohibit the diuretic Bumetanide and impose periods of ineligibility based on the principle that an athlete is personally responsible for a prohibited substance found in his or her system.

62. *The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal Crossroads: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot.*, 111th Cong. 8 (2009) [hereinafter Standen] (testimony of Jeffrey Standen, Professor of Law, Willamette University) (arguing that *Williams* was wrongfully decided and that Congress must act to ensure that professional sports leagues are able to maintain their paramount goals, competitive balance, and competitive integrity).

While some competitive advantages are inevitable, such as the "home-field advantage,"[63] where a team benefits by playing at its own stadium, professional sports leagues attempt to eliminate other local advantages directly.[64] In addition to the anti-doping Policy, the NFL imposes a total cap or limit on teams' salaries in order to preclude a single team from hiring all of the best players, requires each team in the same division to play an identical slate of opponents from another division, and demands league-wide revenue sharing from broadcasts.[65] These restrictions, along with the NFL's anti-doping Policy, help ensure a level playing field.

There are several purposes of anti-doping codes in professional sports: (1) to maintain a level playing field for the athletes; (2) to protect the athletes' health; and (3) to preserve the spirit of sport.[66] The main purpose, however, is to remove the unfair advantage and uneven playing field that can be caused by non-uniform rules regarding drug use in sports.[67] The World-Anti Doping Code, administered by the United States Anti-Doping Code Agency ("USADA") for Olympic athletes, accomplishes uniformity, and thus creates a level playing field for elite athletes.[68] Further, the Code instructs that anti-doping rules should not be subject to state employment laws because "these sport-specific rules and procedures . . . are distinct in nature from and are, therefore, not intended to be subject to or limited by any national requirements and legal standards applicable to . . . employment matters. . . . [A]ll Courts *should* be aware and respect the distinct nature of anti-doping rules."[69] The anti-doping Policy in *Williams*[70] is strikingly similar to the World-Anti Doping Code, and thus, should be applied and respected in the same manner.

The USADA is not alone in recognizing that the sports context calls for special consideration. Appellate courts have recognized the critical need for uniformity in determining athlete eligibility.[71] In the past,

63. Home field advantage is enhanced by fan support, familiarity with the field and its surroundings, and the lack of required travel. Football, ABOUT.COM, http://football.about.com/cs/football101/g/gl_homefieldadv.htm (last visited Oct. 28, 2010).

64. Standen, *supra* note 62, at 7-8.

65. Standen, *supra* note 62, at 8.

66. *World Anti-Doping Code*, WORLD ANTI-DOPING AGENCY (Jan. 1, 2009), http://www.wadaama.org/rtecontent/document/code_v2009_en.pdf.

67. *Id.* (the purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements).

68. *Id.*

69. *Id.* (emphasis added).

70. Williams v. NFL, 582 F.3d 863, 868 (8th Cir. 2009).

71. *See* Dolan v. U.S. Equestrian Team, Inc., 608 A.2d 434, 437 (N.J. Super. Ct. App. Div. 1992) (holding that it would be inappropriate to attribute different unique meanings to [the

the Seventh Circuit emphasized the need for uniformity in such decisions by noting "there can be few less suitable bodies than the federal courts for determining the eligibility or procedures for determining the eligibility of athletes."[72] Further, the Seventh Circuit noted that several other courts have recognized the implication of allowing individual athletes to sue professional sports leagues. "[T]o hold a common law duty exists outside the scope of the [LMRA], thereby enabling an individual athlete to bring suit, threatens to override legislative intent and opens the door to inconsistent interpretations of the [LMRA]."[73]

Additionally, a long history of legislative intent and congressional discouragement illustrates the need for uniform administration of anti-doping codes. Congressional hearings involving athletes and the use of performance-enhancing drugs can be traced back to the 101st Congress.[74] The United States Sentencing Commission Steroid Report of 2006 declares, "[c]ongressional concern is not just about steroid misuse by major league professionals but also the trickledown effects that such use has on amateur athletes, notably teenagers."[75] Thus, decisions that appear to accept the use of steroids by athletes, like *Williams*, not only affect the integrity of the game, but have the far-reaching effect of setting a bad example for athletes of all ages, at all levels of competition.

Congress acknowledges this negative impact. As far back as 1988, Congress has focused intensely on the issue of performance-enhancing drugs in professional sports leagues. The Senate Judiciary Committee conducted hearings called "Steroids in Amateur and Professional Sports: The Medical and Social Costs of Steroid Use."[76] During these

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Amateur Sports Act's] provisions in New Jersey and thus create a jurisdictional sanctuary from the Congressional determination that these types of disputes should be resolved outside of judicial processes).

72. Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 594 (7th Cir. 2001) (holding that the Amateur Sports Act preempted state law claims, because the athlete, whose urine test had indicated a possible blood doping violation, was challenging the methods for determining eligibility of athletes, which is a matter that could not be resolved without opening up the doors to inconsistent interpretations of the Act) (quoting J. Posner's concurring opinion in Michels v. U.S. Olympic Comm., 741 F.2d 155, 159 (7th Cir. 1984)).

73. *Id.* at 595. *See also* Walton-Floyd v. U.S. Olympic Comm., 965 S.W.2d 35, 40 (Tex. Ct. App. 1998) (noting that the interest of maintaining consistent interpretations among jurisdictions requires the LMRA to preempt claims asserted under state tort law).

74. *Steroids in Amateur and Professional Sports: The Medical and Social Costs of Steroid Use: Hearing Before S. Comm. on the Judiciary*, 101st Cong. (1989).

75. U.S. SENTENCING COMM'N: 2006 STEROID REPORT (Mar. 2006), *available at* http://www.ussc.gov/USSCsteroidsreport-0306.pdf.

76. *Steroids in Amateur and Professional Sports: The Medical and Social Costs of Steroid Use: Hearing Before S. Comm. on the Judiciary*, 101st Cong. (1989).

hearings, witnesses testified about the rampant use of steroids in the NFL.[77] In more recent hearings, Representative Henry A. Waxman noted in his opening remarks the significance of the federal government's involvement in the issue of prohibiting performance enhancing drugs in sports. "[T]oday's hearing is about steroid use . . . and the implications for Federal policy. . . . [T]he most important [thing] Congress can do [is to] do our part to change the culture of steroids that has become a part of baseball and too many other sports."[78]

After the Major League Baseball Players Association ("MLBPA") and the National Basketball Players Association ("NBPA") amended their drug testing program in 2005, then-Senator (and now Vice President) Joseph Biden stated: "[T]he collective bargaining process worked. . . . [T]his is a great day for baseball."[79] More recently, Biden commented that "steroids and performance enhancing drugs not only pose a great health risk, but they threaten the fundamental integrity of sports."[80] Congress has left no doubt that the use of performance enhancing drugs by players in the professional sports arena is an issue of significant magnitude and one that requires a league-wide uniform resolution. Congress would not have focused on the use of performance-enhancing drugs so extensively in professional sports leagues had it expected that state regulation would undermine the uniform league-wide anti-doping programs.

D. *Mandatory Arbitration to Enforce Professional Sports' Anti-Doping Programs*

Finally, it is critical to discuss the role that arbitration plays in the enforcement of anti-doping programs, because the Eighth Circuit in *Williams* chose to not enforce the arbitrator's punishment.[81] As a general matter, courts stay on the sidelines during labor negotiations and disputes and show judicial deference to arbitral decisions. The CBAs for all professional team sports leagues provide arbitration procedures for resolving disputes between players and teams that relate

77. *See id.* at 109, 217 (during these hearings, the Senate invited numerous professional athletes and coaches to testify at the time, including Marty Schottenheimer, Joe Paterno and Chuck Knoll).

78. *Restoring Faith In America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use*, 109th Cong. 11 (2005) (statement of Rep. Waxman), *available at* http://www.diamondfans.com/archive/house_hearing_109-8_steroids.pdf.

79. Michael O'Keeffe & T.J. Quinn, *It's 3 Strikes and Yer Out!*, N.Y. DAILY NEWS, Nov. 16, 2005.

80. Press Release, Joseph R. Biden, Jr., Senate's Approval of the International Convention Against Doping in Sport (July 22, 2008) (on file with author).

81. Williams v. NFL, 582 F.3d 863, 875 (8th Cir. 2009).

to the provisions of the CBAs, the standard player/team contracts, and league constitutions and bylaws.[82] Historically, courts have deferred to arbitration decisions rendered in response to compliance with the sport's anti-doping program. The Supreme Court has repeatedly guided courts in respecting arbitration decisions.

> A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.[83]

Uniform administration of rules through a mandatory arbitration process, just like uniform language of the rules themselves, creates a level playing field for the players. Arbitration is the exclusive mechanism for resolving such disputes.[84] The NFL CBA provides:

> Any dispute . . . arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this agreement, the NFL Player Contract, or any applicable provision of the NFL Constitution and Bylaws pertaining to terms and conditions of employment of NFL players, will be resolved exclusively in accordance with the procedure set forth in this Article.[85]

Courts also tend to avoid reviewing the reasonableness of arbitral decisions. "[R]eview of an arbitration proceeding is narrowly limited. A court will not disturb an award if it draws its essence from the CBA and is not based on the arbitrator's own brand of industrial justice."[86] Where a CBA provides for an arbitration procedure for the resolution of disputes over alleged contract violations, as is the case in *Williams*, issues pertaining to the provisions of such agreements are not properly the province of state courts. Rather, they are the province of arbitrators.[87]

There are several reasons why arbitrators are better suited than courts to resolve issues pertaining to provisions of CBAs. First, arbitrators not only have specialized expertise with the language of the applicable labor contract, but also with the customs and practices and

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82. Davis, *supra* note 36, at 592.

83. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985).

84. *Id.* at 204 n.1.

85. Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association, art. IX, § 1, at 13 (Mar. 8, 2006), *available at* http://www.scribd.com/doc/14066936/NFL-CBA-Amended-2006.pdf.

86. *See* Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union, 77 F.3d 850, 853 (5th Cir. 1996) (quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

87. *Id.*

traditions of the industry.[88] Further, by sidestepping the available grievance procedure, arbitration would lose its effectiveness[89] and eviscerate a central tenet of federal labor contract law under Section 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first place.[90] Finally, because arbitration calls for a timely and final resolution, giving parties the ability to rely on the finality of the decision, it is especially valuable in the context of professional sports due to the limited number of years athletes are able to play for. Thus, it is extremely important that courts give proper deference to decisions made in the arbitration proceedings.

III. SUBJECT OPINION: *WILLIAMS V. NFL*

The Eighth Circuit changed all this when it determined that in the professional sports context, not all state law claims are preempted by Section 301 of the LMRA. Section A of this Part discusses the facts of *Williams* and the CBA that was entered into by the NFL and the Union. Section B of this Part explains the Eighth Circuit's attempt to resolve the tension between Section 301 of the LMRA and CBAs entered into by professional sports leagues and athletes. Section C of this Part considers the rationale and explanation for the holding by specifically looking at the state law claims that were held not preempted by Section 301.

A. *Facts of* Williams

On March 28, 2006, the NFLMC and the Union entered into the NFL CBA 2006-2012.[91] The CBA provided that all players, clubs, the Union, the NFL and the NFLMC were bound by its provisions[92] and incorporated the Policy on anabolic steroids and related substances to ban NFL players from using a number of "prohibit[ed] substance[s] including blocking or masking agents" such as "diuretics or water

88. *See Lueck*, 471 U.S. at 210; *see also* Oberkramer v. IBEW-NECA Serv. Ctr., Inc., 151 F.3d 752, 756 (8th Cir. 1998) (stating that Section 301 preemption is necessary to preserve the central role of arbitration in our system of industrial self-government); *see also* Vacca v. Viacom Broad. of Mo., Inc., 875 F.2d 1337, 1343 (noting that Section 301 preemption is designed to further a policy aim set forth in Lueck—that of protecting and encouraging arbitration).

89. *Lueck*, 471 U.S. at 219.

90. *Id.*

91. Williams v. NFL, 582 F.3d 863, 868 (8th Cir. 2009).

92. NFL PLAYERS ASS'N: NAT'L FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES, art. II § 1 (2008) [hereinafter Policy].

pills."[93] The Policy adopts strict liability enforcement, under which "players are responsible for what is in their bodies" and are not "excused because . . . [he] was unaware he was taking a Prohibited Substance."[94] The Policy goes on to address the consequences of a player's confirmed positive test result: "[T]he first time a player violates this policy by testing positive [for a banned substance] . . . he will be suspended without pay for a minimum of four regular and/or postseason games."[95] Players who are subject to disciplinary action may appeal to an arbitrator, whose decision "constitute[s] a full, final, and complete disposition of the appeal" that is "binding on all parties."[96]

In July and August 2008, five NFL football players – Kevin Williams and Pat Williams of the Minnesota Vikings, and Charles Grant, Deuce McAllister, and Will Smith of the New Orleans Saints – tested positive for bumetanide, a prescription diuretic and masking agent, which is banned by the NFL's Policy on anabolic steroids and related substances because it can be used to mask the presence of steroids.[97] The players were in violation of the Policy, after taking a dietary supplement called StarCaps.[98] In October 2008, the five NFL professional football players were each suspended for four games, without pay, for violation of the anti-doping rules.[99] Pursuant to the terms of the Policy, which allowed players subject to disciplinary action to appeal to an arbitrator, all five players appealed their suspensions, and their appeals were consolidated.[100]

B. *Procedural History*

On November 20, 2008, the arbitration hearing took place with Jeffrey Pash, the Vice President and General Counsel of the NFL, presiding as the hearing officer.[101] Pash determined that the language of the Policy required the suspensions of all the players to be upheld.[102] Subsequently, on December 3, 2008, Minnesota Vikings players Kevin Williams and Pat Williams (the "Players"), filed suit against the NFL in Minnesota Federal District Court, alleging numerous violations of

93. *Id.* at § 2 (blocking and masking agents, such as diuretics or water pills, are banned because they can mask the presence of steroids).

94. *Id.* at § 3(E).

95. *Id.* at § 6.

96. *Id.*

97. Williams v. NFL, 582 F.3d 863, 870 (8th Cir. 2009).

98. Policy, *supra* note 92 at app. A(II)(A) (bumetanide is specifically banned under the Policy; however, StarCaps was not explicitly banned under the policy).

99. *Williams*, 582 F.3d at 869.

100. *Id.*

101. *Id.* at 871.

102. *Id.* at 872.

Minnesota common law.[103] Soon after, the Players amended their complaint to assert a violation of Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA") and a violation of Minnesota's Consumable Products Act ("CPA").[104] Both Acts place restrictions on employer's drug testing policies.[105]

The Players argued that the NFL testing procedure was unfair and violated the players' rights and Minnesota employment laws.[106] Using the two-pronged analysis previously discussed in *Bogan*:[107] that (1) a state-law claim is preempted if it is based on a provision of the CBA, meaning that the CBA provision at issue actually sets forth the right upon which the claim is based,[108] and (2) a state-law claim is preempted where the claim is dependent upon an analysis of the relevant CBA, meaning that the plaintiff's state-law claim requires interpretation of a provision of the CBA,[109] the trial court held that the Players' DATWA and CPA claims were not preempted, because the rights and obligations under the state statutes existed independently of the CBA and NFL Policy.[110] The NFL appealed the district court's decision that the Players' Minnesota statutory claims were not preempted by Section 301, arguing that each claim could only be resolved by interpreting and applying the provisions of the NFL's CBA.[111]

The DATWA imposes "minimum standards and requirements for employee protection with regard to an employer's drug and alcohol testing policies."[112] The DATWA expressly addresses CBAs, and states that the Act "shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection."[113] However, the DATWA applies to all CBAs in effect after passage of the law in 1987.[114]

The Minnesota CPA generally prohibits employers from "disciplin[ing] or discharg[ing] an employee because the . . . employee engages in or has engaged in the use or enjoyment of lawful consumable

103. *Id.*
104. *Williams*, 582 F.3d at 872.
105. *See id.*
106. *Id.*
107. Bogan v. Gen. Motors Corp., 500 F.3d 828, 832 (8th Cir. 2007).
108. *Id.*
109. *Id.*
110. *Williams*, 582 F.3d at 873.
111. *Id.*
112. MINN. STAT. § 181.955 subdiv. 1 (2010).
113. *Id.*
114. *Id.* § 181.955 subdiv. 2.

products, if the use or enjoyment takes place off the premises of the employer during nonworking hours."[115] The CPA defines lawful consumable products as those that are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages and tobacco."[116] However, there are exceptions as to what an employer may restrict. An employer can restrict employee consumption of "lawful consumable products" if they "relate[ ] to a bona fide occupational requirement and [are] reasonably related to employment activities or responsibilities of a particular employee or group of employees."[117] Also, an employer can restrict lawful consumable products if doing so is "necessary to avoid a conflict of interest with any responsibilities owed by the employee to the employer."[118] This is relevant because consumption of products such as the diuretic used in *Williams*, arguably can be restricted by the NFL as the employer, because doing so is necessary to avoid conflicts of interest between the NFL and its players.

C. *The Eighth Circuit's Opinion in* Williams

i. DATWA Is Not Preempted by Section 301

The federal appellate court reasoned that to resolve the DATWA claims, it only needed to compare an employer's actual testing procedures with DATWA's requirements.[119] By comparing the facts and the procedure that the NFL actually followed with respect to its drug testing of the Players with DATWA's requirements, the court was able to resolve the Players' DATWA claim.[120] Therefore, the court decided it had no need to consult the Policy.[121] This finding contributed to the ultimate holding that the DATWA claim is not preempted by Section 301.[122]

Moreover, the appellate court did not have to interpret the CBA in order to determine if the NFL qualified as an employer under the DATWA. Instead, the court only needed to reference certain provisions of the CBA for mere consultation; interpretation was not required.[123] The court quoted the Ninth Circuit in dismissing the NFL's argument that denying preemption would render the uniform enforce-

115. MINN. STAT. § 181.938 subdiv. 2 (2010).
116. *Id.*
117. *Id.* § 181.938 subdiv. 3(a)(1).
118. *Id.* § 181.938 subdiv. 3(a)(2).
119. Williams v. NFL, 582 F.3d 863, 876 (8th Cir. 2009).
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 877.

ment of its drug testing policy ineffective: "the terms of CBAs affecting employees in multiple states *should* supersede inconsistent state laws."[124] Both the Eighth and Ninth Circuits relied on the Supreme Court decision in *Lueck*,[125] where the Court reasoned that "Section 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law."[126] Consequently, the Court held that the Players' DATWA claim was not dependent upon interpretation of the CBA or Policy, and thus is not preempted by Section 301.[127]

ii. CPA Is Not Preempted by Section 301

Likewise, the federal appellate court held that Section 301 did not preempt the Minnesota CPA claims. In doing so, it rejected the NFL's arguments that (1) the court would have to interpret the Policy to determine whether CPA defenses applied (e.g., that the bumetanide ban was a bona fide occupational requirement or necessary to avoid conflicts) and whether the players' use had occurred away from work, during non-working hours; and (2) the players had waived CPA rights when the Union became a party to the Policy.[128]

First, the appellate court found that defenses to state law liability were irrelevant because the CPA claim on the merits was grounded in state law, not the CBA, and thus it was not preempted. Second, it rejected the NFL's claim that the CBA had to be interpreted, because the CPA claim applied only to lawful substance use "off the premises of the employer" and "during non-working hours."[129] As such, interpretation of the CBA or Policy was unnecessary, because neither document defined "off the premises of the employer" or "during non-working hours" in relation to the time frame (during training camp) in which the players tested positive.[130] Lastly, it rejected the NFL's claim that the players waived their rights under the CPA. The court reasoned that although state law rights that do not exist independently of labor agreements can be waived, those rights that are created independent of a CBA, such as though created by the CPA, may not be

124. *See* Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 695 (9th Cir. 2001) (a large trucking company made a similar argument to the NFL, and the 9th Circuit held that the LMRA did not give employers and unions the power to displace any state regulatory law they found inconvenient).

125. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211-12 (1985).

126. *Cramer*, 255 F.3d at 695.

127. *Williams*, 582 F.3d at 878.

128. *Id.* at 879.

129. *Id.* at 880.

130. *Id.*

waived.[131] This holding presents a substantial obstacle for effective anti-steroid and anti-doping testing in major sports leagues, and left many, including the NFL, wary about the potential far-reaching ramifications of this decision.

IV. ANALYSIS

In affirming the federal district court decision, the Eighth Circuit erred in two distinct ways in *Williams*.[132] First, the Eighth Circuit erred in holding that Section 301 did not preempt the DATWA and CPA claims, because those claims can only be resolved by interpreting and applying the provisions of the NFL's collectively bargained drug testing program. This holding not only ignored congressional intent and Supreme Court authority, but also severely handicapped the latitude of permissible agreements that the NFL and Union may create in the future with regards to its players. The implications of this holding go far beyond determining who will be able to play defensive tackle for the Minnesota Vikings. The Eighth Circuit's decision in *Williams* that state statutory claims were not preempted by federal law has left professional sports leagues with a patchwork of different state laws and regulations, making it impossible to maintain a uniform drug use policy across states. Second, the Eighth Circuit failed to respect the arbitration decision. Arbitration procedures in respect to professional sports must be respected due to their unique ability to provide a timely and accurate resolution, and due to the arbitrator's superior knowledge of industry standards.[133]

A. *Federal Preemption Was Warranted for the DATWA and CPA Statutory Claims*

Section 301 preemption should have been enforced in *Williams* with respect to the players' DATWA and CPA claims, because those claims challenge the lawfulness of a provision in the CBA and are substantially dependent upon or inextricably intertwined with the interpretation of the terms of such an agreement. Here, the DATWA and CPA claims only exist by virtue of the Policy, which was the product of the CBA between the NFL and the Union. Had the two parties never entered into this CBA, there would never have been a drug test to begin with, and, therefore, there would have been no basis for a claim.

131. *Id.*

132. *Williams*, 582 F.3d at 868.

133. Policy, *supra* note 92, § 10 (the Policy required the arbitrator to be the Commissioner or his assignee. Further, the Policy stated that the arbitrator's decision constitutes a full, final, and complete disposition of the appeal that is binding on all parties.).

The DATWA claim is preempted because it mandates reference to and analysis of the Policy. The DATWA states that "parties to a collective bargaining agreement" can "bargain[ ] and agree[ ]" to a drug testing policy as long as that policy "meets or exceeds, and does not otherwise conflict with" DATWA's minimum standards.[134] Therefore, in order for the Players to succeed on their DATWA claim, the court would have to interpret certain terms of the CBA in determining whether the CBA met or exceeded DATWA's threshold requirement within the meaning of the Policy.[135] The Eighth Circuit in *Williams* ignored this argument, and instead simply compared DATWA requirements with the procedures that the NFL followed with respect to its drug testing of the Players.[136] However, that is not what the DATWA commands; the DATWA requires courts to analyze and interpret the Policy and its requirements so it can meaningfully compare them to the requirements of the DATWA. Thus, the *Williams* court should have preempted the claim, because the DATWA claims are "inextricably intertwined with consideration of the terms of the [Policy]."[137] The Eighth Circuit should have more closely examined the plain language of the DATWA statute and understood it to mean that the court must examine the CBA in its analysis.[138]

Further, the Players were essentially challenging the "very legality" of a provision of the CBA.[139] The basic thrust of the claims in *Williams* is the enforcement of the CBA itself, and – because there is no doubt that the drug testing, review, and discipline procedures were authorized by the terms of the Policy – the court should have determined that resolution of the DATWA claim obviously required an in-

134. MINN. STAT. § 181.955(1) (2010).

135. *See* Gore v. Trans World Airlines, 210 F.3d 944, 951 (8th Cir. 2002) (explaining that claims must be preempted that require interpretation of certain terms of the collective bargaining agreement).

136. *Williams*, 582 F.3d at 876.

137. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985).

138. *See* Zupanich v. U.S. Steel Corp., 2009 U.S. Dist. LEXIS 44504, at *8-9 (D. Minn. May 27, 2009) ("[T]he plain language of the statute requires the Court to examine the CBA to determine whether the agreement negotiated by the parties . . . resulted in conditions that are more favorable to the employees. As such, the claim is inextricably intertwined with the CBA."); *see also* Stringer v. NFL, 474 F. Supp. 2d 894, 910 (holding that the wrongful death suit was preempted because the suit was intertwined with the CBA provisions regarding certification of team trainers and responsibilities of team trainers and physicians).

139. *See* Medrano v. Excel Corp., 985 F.2d 230, 234 (5th Cir. 1993) (where the claims are essentially challenging the very legality of a provision of the CBA that had been faithfully applied and [that] was the basis for [the plaintiff's] termination, they will be preempted, because the basic thrust of [plaintiff's] claim is that the enforcement of the CBA itself constitutes a tort under state law, and resolution of that claim would obviously require an interpretation of the CBA).

terpretation of the CBA. If there was no collectively bargained drug testing program, there would be no drug test, and there would be no claim.

More importantly, the DATWA was not intended to apply to the NFL Policy. The DATWA was designed to regulate testing for recreational drug use and abuse by employees in Minnesota.[140] Thus, even if the suspensions were a technical violation of DATWA, they did not violate the spirit of the law. The Minnesota Legislature was concerned about the use and abuse of inebriating and addictive drugs by employees; the Legislature was not concerned about the use of performance-enhancing drugs by professional athletes in interdependent sports leagues.[141] While the DATWA was designed to ensure that drug testing in the workplace was not unnecessarily invasive, unfair, or unreliable, the NFL Policy was designed to sustain and promote the integrity of the game.

Likewise, *Williams*' CPA claim was precisely the type of state law claim that should be preempted by Section 301. While the CPA bars employers from "prohibiting the use or enjoyment of lawful consumable products off the premises of the employer during nonworking hours," it excepts restrictions that "relate to a bona fide occupational requirement and [are] reasonably related to employment activities or responsibilities."[142] Thus, the court in *Williams* would have had to look to the CBA in order to determine whether its anti-doping restrictions are related to a "bona fide" occupation qualification and employment activities. The court would have to look to the CBA to identify the scope of NFL players' employment activities, and whether those duties were requirements of the job. Therefore, the court should have preempted the CPA claim. If the court held that the claims were preempted, the arbitration decision would have been given the appropriate deference, and the Policy that was specifically bargained for by the NFL would have been enforced.

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140. *The NFL StarCaps Case: Are Sports' Anti-Doping Programs at a Legal CrossRoads: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection,* 111th Cong. 7 (2009) (testimony of Gabriel A. Feldman, Associate Professor of Law and Director of Tulane Sports Law Program, Tulane University School of Law) (arguing that the *Williams* decision causes a problem that can be resolved without Congress creating an exemption).

141. Workplace drug laws appeared in the United States after the rate of drug abuse among Americans climbed in the 1980s. *See* Deborah F. Crown & Joseph G. Rosse, *A Critical Review of the Assumptions Underlying Drug Testing*, 3 J. BUS. AND PSYCHOL. 22 (1988). As a result of the rapid growth of drug testing by private employers, several states, including Minnesota, enacted workplace drug regulations to protect employees. The legislature recognized that the employees had basic privacy rights that warranted protection. *Id.*

142. MINN. STAT. § 181.938(2) (2010).

Again, the Minnesota legislature did not intend for the CPA to be applied in the professional sports context. The CPA was enacted to prevent employers from disciplining employees who used legal substances – in particular, alcohol or tobacco – away from company property and during non-working hours.[143] It was clearly not intended to limit the ability of professional sports leagues to test for the use of steroids and should not have been interpreted as such.

i. The Enforcement of a Sport's Anti-Doping Rules Should Be Uniform Across the Fifty States

The full impact of the Eighth Circuit's decision cannot be understood without giving due consideration to the unique circumstances in which professional sports leagues function. Although the decision is troubling for all multi-state business organizations, the NFL is different from most other organizations in the fact that the NFL teams do not wish to drive each other out of business, but rather rely on competition among its cooperators – the other teams in the league.[144] This decision significantly handicaps the latitude of permissible agreements that the NFL and the Union may strike, creating a huge impediment to a successful bargaining resolution between the NFL and its players.

By claiming the benefit of unique Minnesota statutes, the Players from Minnesota received a judicial injunction to continue playing and potentially override their suspension, while the New Orleans Saints players remained suspended for use of the same substance.[145] This is a perfect example of how the decision facilitates unjust and unfair results: players belong to the same union, playing under the same Policy, and violating the same provision, are now playing under different rules simply because they play in different states.

Minnesota's statutory protections make it more difficult to enforce the NFL's anti-doping Policy against Vikings' players then against

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143. *See generally* MINN. STAT. § 181.938 (2010); *see also* V. John Ella, *What Do They Have in Mind? Minnesota's Drug-Testing Law Turns 20*, 64 BENCH & B. MINN. 22, 23 n.4 (Sept. 2007), *available at* http://www.mnbar.org/benchandbar/2007/sept07/drug_testing.htm.

144. *See* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 961 (2d Cir. 1987) (rejecting player's challenge on antitrust grounds to league's salary cap and college player draft, the court stated: "Bargaining relationships [between professional athletes and their leagues] raise numerous problems with little or no precedent in standard industrial relations. As a result, leagues and player unions may reach seemingly unfamiliar or strange agreements. If courts were to intrude and to outlaw such solicitations, leagues and their player unions would have to arrange their affairs in a less efficient way.").

145. The New Orleans Saints players are waiting until the Minnesota players claims are resolved before serving their sentencing.

players on other NFL teams.[146] The decision in *Williams* leaves Minnesota sports teams with a competitive advantage over other teams and corporations. The unique character of the rules governing nationwide athletic competition calls for and requires all states to look to federal labor law when governing the interpretation and enforcement of the Policy in order to prevent fragmentation of the NFL competitive structure on the basis of state lines.[147] Therefore, when dealing with a drug testing policy that was adopted as part of a nationwide CBA governing the interstate play of professional athletes, state law must give way to the need for "interpretive uniformity and predictability" that Section 301 is aimed at.[148]

Other states can now perhaps manipulate the decision in *Williams* to possibly secure a competitive advantage for their respective home teams. State legislatures could draft laws similar to Minnesota's CPA in order to ensure that professional sports teams within its jurisdiction will be allowed to take performance enhancing drugs without recourse. International sports organizations, such as the Major League Baseball ("MLB") and the National Basketball Association ("NBA"), will now likely struggle to enforce a uniform set of rules in various states, since laws in different states can now seemingly outlaw the ability of the league to maintain an equal playing field.

The three players from New Orleans, and the state of New Orleans as a whole, have been treated unfairly. In response, it is possible that the New Orleans state legislature could draft a new state law that would override the NFL CBA. This law could conceivably be devised to prohibit the player entry draft, negate the rookie wage scale, render illegal any restraints on the trade of player contracts, or allow teams to

146. *See* Michael C. Dorf, *Football and Federalism: A Case Centers on NFL Drug Testing*, FINDLAW (Sept. 23, 2009), *available at* http://writ.news.findlaw.com/dorf/20090923.html.

147. Partee v. San Diego Chargers Football Co., 668 P.2d 674, 678 (Cal. 1983) ("Professional football is a nationwide business structured essentially the same as baseball. Professional football's teams are dependent on a league playing schedule for competitive play, just as in baseball. The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state.").

148. Trs. of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc., 450 F.3d 324, 334 (8th Cir. 2006) (a trustee of multiemployer fringe benefit funds brought an action against a company that specialized in caulking and waterproofing for a violation of a statewide CBA. The defendants filed a third party complaint against the union for fraudulent inducement. The court held that the third party claims for fraudulent and negligent misrepresentation were preempted under Section 301 of the LMRA, because in order to resolve the claim, the court would need to perform a substantial independent analysis of the CBA.).

break contracts to play games. Assume, for the sake of argument, that New Orleans enacted a state workplace drug testing law that did not permit an employee to be suspended from his job ever for a first offense. The NFL, in turn, would have to adopt this same provision for all of its players. NFL's General Counsel, in criticizing the *Williams* decision, stated "there is nothing stopping any state from tomorrow saying you have to give this person this many days before testing them. If you're going to give them that amount of days notice, you might as well hand them a 'you pass' card."[149]

Not only does this decision create a patchwork of laws among states, but it goes against congressional intent in drafting the LMRA. Congress intended for Section 301 to preempt claims arising from state laws like the DATWA and CPA. Congress enacted Section 301 precisely because of "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."[150] The Eighth Circuit completely ignores Congress' repeated attempts to establish uniformity on the issue of performance enhancing steroid use in professional sports leagues. The league-wide solution that Congress struggled for so many years to find was finally achieved through the collective bargaining process,[151] and Section 301 preemption is needed to protect this process.

Further, in holding that the state statutory claims were not preempted by Section 301, the Eighth Circuit directly contravened the mandatory requirements of, and the public policy supporting, the World Anti-Doping Code. As previously mentioned, the NFL CBA and World Anti-Doping Code have striking similarities. A fundamental objective of all anti-doping programs is to maintain a level playing

149. Adolpho Birtch, NFL General Counsel, Keynote Speaker at DePaul University College of Law (Nov. 16, 2009) (arguing that the *Williams* decision was wrongfully decided. The state laws were not meant to apply to professional sports leagues. The decision is going to create chaos, because potentially every state could be in conflict with the CBA in the future.).

150. Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962).

151. *Steroids in Amateur and Professional Sports: The Medical and Social Costs of Steroid Use, Before the S. Comm. on the Judiciary*, 101st Cong. (1989). *See also* George W. Bush, Address Before a Joint Session of Congress on the State of the Union (Jan. 20, 2004), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2004_presidential_documents&docid=pd26ja04_txt-10, ("Athletics play such an important role in our society, but unfortunately, some in professional sports are not setting much of an example. The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message . . . so tonight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, and to get ride of steroids now.").

field for the athletes;[152] however, *Williams* makes fair competition impossible. The purpose of the Policy was to enforce a single, uniform standard of player conduct to ensure an even playing field for *all* players. This is unjust to other states whose own statutes would not have protected the players, and all the other players in the NFL who do not use the substances. Moreover, allowing players who violate the drug Policy to continue to play threatens the fairness and integrity of athletic competition. The Eighth Circuit's misguided decision in *Williams* to not extend Section 301 to the player's state statutory claims undermines the authority of NFL and employers alike and opens a dangerous door that could result in further litigation from national employers who will now likely face an uphill battle to enforce its CBAs with employees of different states.

ii. Effect of *Williams* on the Union: The Bigger Picture

The dangers posed by the Eighth Circuit's opinion stretch beyond the context of professional sports leagues. By disallowing preemption of the state statutory claims, the *Williams* court stripped employers of their powers to bargain and negotiate with employees in a meaningful way. This decision leaves multi-state employers vulnerable, with no outlet to ensure its policies are uniformly enforced at *all* levels and locations. Consider this hypothetical: a Chief Executive Officer of a huge corporation has employees working in over thirty states. He has to enforce the drug policy that was collectively negotiated with all the employees of the corporation across state lines. During a routine drug test, one employee in Illinois and another in Minnesota test positive for a banned substance. Due to the decision in *Williams*, the CEO can legally fire the employee in Illinois for cause in accordance to the conditions of the company's CBA, but cannot fire the employee in Minnesota for the same offense. Now the Illinois employee who was fired has suffered a blatant injustice since the employee in Minnesota – who also violated the same policy – is still employed. The CEO would not be able to effectively enforce his work policies in Illinois again because his authority has been undermined. The CEO's authority is injured, because the CEO will not be able to enforce the terms that were specifically agreed to.[153] This is exactly the effect the *Williams* decision will have on employers.

Undoubtedly, the NFL will have a hard time enforcing its drug Policy in many other states because of this new precedent issued by the

152. World Anti-Doping Code, *supra* note 66, at art. 3.4.

153. This hypothetical assumes that the Company has a national Union and nationwide CBA, and that Minnesota has a state law that prevents the firing of the employee for said conduct.

Eighth Circuit. NFL players, regardless of what state they reside in, now know that the two Vikings players were able to play despite the two Players' violation of the Policy and their subsequent suspension. After *Williams*, there are few, if any, affirmative acts an employer may take in policy administration to assure federal preemption. Essentially, CBAs will add little in the way of interpretation, and the negotiated policies that an employer reaches with his employees are no longer a safe harbor.[154]

Because uniformity in the interpretation of CBAs is vital to the federal scheme favoring collective bargaining, the *Williams* decision is a hard hit for all employers. The holding will not stay confined to the NFL and the two Minnesota Vikings Players; instead, it extends to all employers who have grown accustomed to relying on the power of negotiation to tailor CBAs with large groups of employees spread out over several states. Employers are now mandated to consult every state's workplace laws, along with all other potentially applicable statutes, when negotiating their policies. This is an arduous task, which at the end of the day leaves employers frustrated and stripped of their once meaningful power to negotiate.

B. *Uniform Enforcement of a Sport's Anti-Doping Policy Is Best Served by Judicial Deference to Arbitration Decisions*

Equally problematic is the Eighth Circuit's lack of judicial deference to arbitration decisions rendered under the NFL's Policy. Uniform administration of rules through a mandatory arbitration process, just like uniformity of the rules themselves, creates a level playing field for all teams and athletes.[155] Consequently, uniform enforcement of sport's anti-doping rules is best served by judicial deference for arbitration decisions.

The NFL Policy provides its own specialized adjudication system to resolve confirmed positive test results. "Players subject to disciplinary action may appeal to an arbitrator, who is either the Commissioner or his designee," and whose decision "constitute[s] a full, final, and complete disposition of the appeal" that is "binding on all parties."[156]

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154. *See* Dale Deitchler, *United States: Minnesota Law Applies to Union-Negotiated Drug Testing Policies, Says Eighth Circuit*, LITTLER BLOGS (Sept. 2009), http://www.littler.com/PressPublications/Lists/ASAPs/DispAsaps.aspx?id=1431&asapType=National.

155. *See* World-Anti-Doping Code, *supra* note 66, and the USADA Protocol. Both require a single arbitral body to be the final decision-maker in Olympic Movement anti-doping cases. Under the World-Anti-Doping Code, decisions by an arbitrator shall be final, binding on the parties, and not subject to further review. The CAS process is well adapted to efficient and timely resolution of anti-doping disputes.

156. Policy, *supra* note 92, § 10.

There is no question that in negotiating the Policy, the NFL intended for disputes to be handled through arbitration. Arbitration is especially valuable in the context of sports, mainly due to the availability of a timely resolution, the ability of parties to rely on the finality of the decision, and the arbitrator's specialized knowledge of league rules and customs. Further, as previously mentioned, the Supreme Court has repeatedly guided courts to respect and defer to arbitration decisions.[157]

In *Williams*, Jeffrey Pash, the Executive Vice President and General Counsel of the NFL was the hearing officer for the appeal at the arbitration.[158] Pash was better suited to deal with the suspension of the Players than the Eighth Circuit because of his extensive legal experience in the professional sports context[159] and his knowledge of the customs, practices, and traditions of professional sports leagues. The NFL is a unique creature, and Pash had expertise with the industry and the language of the CBA. His decision to uphold the suspensions was far more informed than that of a court who deals with the issue at arms length. Thus, the court in *Williams* should have respected and deferred to Pash's initial decision.

V. IMPACT

The Eighth Circuit's decision could have disastrous ramifications for the NFL and other professional sports leagues, specifically in regard to the interplay between state statutory drug testing laws and the league's testing policies for performance-enhancing drugs. Currently, five states have mandatory drug regulation statutes that directly conflict with the NFL Policy.[160] However, every state that is home to at least one professional sports franchise restricts workplace drug testing in some way, making it possible for the *Williams* decision to have a far-reaching effect.[161] Further, the risk remains that a state might en-

157. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

158. Williams v. NFL, 582 F.3d 863, 871 (8th Cir. 2009).

159. Women's Campaign Forum, http://www.wcfonline.org/sites/wcf/index.php/event/bio/dinner_13/ (last visited Feb. 18, 2009) (Pash worked for a D.C. Law firm Covington & Burling, which worked on the NFL account. Later, Pash signed on with the NHL, where he served four years as general counsel. In 1996, Pash started working for the NFL, where he has been ever since.).

160. These states are Arizona, Louisiana, Maryland, Minnesota, and North Carolina. *See* Feldman, *supra* note 140, at 14.

161. *See* ALA. CODE § 25-5-330 (1995), ALASKA STAT. § 23.10.600 (2007), ARIZ. REV. STAT. ANN. § 23-493.04(A) (2000), CONN. GEN. STAT. § 557-31-51(w) (2003), HAWAII REV. STAT. ANN. §§ 329B 4-5 (2007), IDAHO CODE § 72-1702(1) (2005), 127 ILL. COMP. STAT. 580/5 (2010), IOWA CODE § 730.5(2) (2006), MAINE REV. STAT. ANN. § 26-683(3) (1995), MISS. CODE § 71-7-3 (2004), MONT. CODE ANN. § 39-2-207 (2009), NEB. REV. STAT. § 48-1903 (2000), N.C. GEN.

act a new statute or modify an existing statute that would conflict with the NFL Policy. Thus, the *Williams* decision is unhealthy for the NFL's drug testing Policy as a whole. With each Policy violation, it will be necessary under *Williams* to get the states' interpretations of their respective labor laws and allow each player to make an excuse for why a banned substance was found by drug test.

In light of this decision, the NFL Commissioner, Roger Goodell, went before Congress on Nov. 3, 2009, and lobbied for legislation that would exclude CBAs from state law challenges.[162] The use of state law to block suspensions "illustrates with compelling force the need for legislation here."[163] Representative Henry A. Waxman, the Chairman of the House Energy and Commerce Committee, said the *Williams* decision "could render the NFL and Major League Baseball drug testing programs unenforceable, loophole-ridden and unacceptably weak and ineffective."[164] While Goodell's proposition was met by supporters as well as critics, it still remains to be seen whether Congress will pass an amendment to avoid future suits similar to the one in *Williams*.

Not only does this decision undermine the integrity of sports and strip employers of their effective power to negotiate with employees, but it downplays the importance of arbitration in the union atmosphere. The decision leaves all employers who have negotiated a CBA wondering how effective having an arbitration clause in the agreement really is, evincing the need for all courts to give judicial deference to arbitrators decisions. It is no surprise that the NFL was displeased with the ruling of the Eighth Circuit, and it requested that the entire Eighth Circuit hear the case.[165] The MLB, NBA, and the National Hockey League ("NHL") all filed briefs supporting the NFL, arguing that the court's decision affected each organization's ability to enforce its own rules prohibiting use of athlete steroids and other performance-enhancing drugs.[166] However, in a split decision in December

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STAT. § 95-232 (2006), OKLA. STAT. ANN. § 40-551 (1993), R.I. GEN. LAWS § 28-6.5-1 (2003), S.C. CODE ANN. § 44-107-50 (2009), TENN. CODE § 50-9-105 (2001), UTAH CODE § 34-38-5 (2001), 21 V.S.A. § 513 (1987).

162. *Goodell to seek labor law amendment in wake of Williams Case*, CBS SPORTS, Nov. 2, 2009, at 1, *available at* http://www.cbssports.com/nfl/story/12461657.

163. *Id.*

164. *Goodell Meets Support, Critics in Congress over Drug Programs*, ASSOC. PRESS, Nov. 3, 2009, at 1, *available at* http://www.nfl.com/news/story?id=09000d5d813ec617&template=with-video-with-comments&confirm=true.

165. Steve Karnowski, *Appeals court declines to rehear Williamses case*, STAR TRIBUNE, Dec. 14, 2009, at 1, *available at* http://washingtonexaminer.com/sports/appeals-court-declines-rehear-williamses-case.

166. *Id.*

2009, the Eighth Circuit denied the NFL's request for a full panel rehearing; four of the court's eleven judges dissented.[167]

The extent of the problem has not been fully revealed, as the NFL recently filed an appeal of the *Williams* decision to the Supreme Court.[168] The NFL argues in its brief to the Supreme Court that "The Eighth Circuit's erroneous pre-emption decision thus has turned federal labor law from a uniform and stable framework for labor-management relations into a legal Catch-22 in which employers are literally liable if they do comply with the collective bargaining agreement, and liable if they do not."[169] Some have speculated that because the preemptive scope of labor law is judge-made, it is possible that the Supreme Court will hear the case and expand the scope of Section 301 preemption.[170] In May 2010, the Minnesota state court ruled in the NFL's favor in the *Williams* case. After a two-month-long trial,[171] the court held that the Players were not harmed by the NFL's violation of the state workplace laws and thus the state laws did not prevent the NFL from suspending the Players.[172] The Players still have yet to serve their suspension.[173] While this was a small victory for the NFL, the league still remains the ultimate loser. Since the *Williams* case began, the NFL has been seeking a determination that the NFL's drug policies trump state law, so that players cannot resort to state laws to challenge drug suspensions. The NFL did not get that from the Minnesota state ruling. The fact of the matter remains that

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167. *Id.*

168. *NFL files appeal of StarCaps case to Supreme Court*, CBS SPORTS, May 13, 2010, *available at* http://www.cbssports.com/nfl/story/13387307/nfl-files-appeal-of-starcaps-case-to-supreme-court/rss.

169. *Id.*

170. Standen, *supra* note 62, at 5.

171. *Judge allows Vikings' players Starcaps suit vs. NFL to go to trial*, USA TODAY, Feb. 18, 2010, *available at* http://www.usatoday.com/sports/football/nfl/vikings/2010-02-18-williams-starcaps-suit_N.htm (Judge Gary Larson, a Minnesota state court judge, in response to both parties' motions for summary judgment, ruled on February 18, 2010, that the case will go to trial March 8, 2010. His 44-page opinion reiterated the Eighth Circuit's holding that NFL drug policies do not trump state law, and held that the DATWA and the CPA apply to professional sports leagues. Judge Larson held that the NFL may have violated the DATWA confidentiality provision, and also by failing to inform the Players of their positive test results within three days of the test. However, he rejected the Players CPA claims. Further, Judge Larson specifically rejected the notion that the NFL had a special need to maintain a uniform policy: "[D]espite varying state laws, corporations that participate in employee drug testing conduct business across state lines everyday in this country. Defendants failed to demonstrate why it would be more onerous for the NFL to comply with state laws, than for any other business engaged in interstate commerce.").

172. Mark Maske, *Judge Rules in NFL's favor in 'StarCaps' case*, THE WASHINGTON POST, May 6, 2010, *available at* http://views.washingtonpost.com/theleague/nflnewsfeed/2010/05/judge-rules-in-nfls-favor-in-starcaps-case.html.

173. *Id.*

the Players were still *able* to bring their state law claims against the NFL, even though they ultimately lost on those claims. The state court decision does not change the fact that state law claims are not preempted by the NFL CBA. Now, the NFL must wait to hear if the Supreme Court will hear the case. Regardless of whether or not the Supreme Court grants Certiorari, the NFL will need a solution in order to prevent similar situations from happening in the future.[174]

VI. POSSIBLE SOLUTIONS

A solution to this preemption problem, while necessary, seems far off. The simplest solution would be for the NFL to seek a statutory exemption from the Minnesota State Legislature to prevent a similar situation from arising in the future. This solution, however, is premised on a Minnesota state court concluding that the suspensions were in fact a violation of the Minnesota laws.[175] In the *Williams* case, the Minnesota state court found that the suspensions were not a violation of the Minnesota laws. However, if another state court ever holds that similar suspensions violated state law, the NFL would be able to appeal to the state legislature and argue that the Minnesota laws were not intended to apply to the drug-testing of professional athletes. The Minnesota legislature could then carve out an exception in the laws that states the laws do not apply to collectively bargained performance enhancing drug testing policies of professional sports leagues.

The NFL could also bargain for the next CBA with state laws in mind. In future agreements, the NFL could draft its Policy to meet or exceed the most protective state standards. However, this solution poses a problem; among the twenty-two states that currently have an NFL franchise, state law varies widely and is constantly changing. Consequently, the NFL Policy would have to be continuously amended every time state legislatures changed respective state law in order to meet or exceed it. It appears nearly impossible to have a drug testing policy that would be able to comply with not only twenty-two current state laws, but also as twenty-two states' potentially applicable state laws. This solution also does not take into account that states are not seemingly considering the NFL's needs when drafting these laws. As it stands, several state laws punish violators of drug policies in the workplace with prolonged sanctions. For example, the DATWA gives first-time violators the right to go to rehabilita-

174. *Id.*
175. *Id.*

tion.[176] Due to the nature of the NFL – with seasons that are short and players who do not have a large window of time they are able to play in the NFL – punishment by rehabilitation would not fit the particular needs of the NFL.

The NFL has another option when drafting future CBAs. The NFL and the Union could amend the current policy to require *not only* arbitration proceedings for violations of its own policies, as the CBA in *Williams* did, but also require mandatory arbitration for all state claims related to drug testing. As previously discussed, courts have long favored arbitration agreements in CBAs involving professional sports,[177] and the addition of a clause providing mandatory arbitration for state claims would further ensure judicial deference to the arbitration system. Waiving the right to judicial forum is not a waiver of the substantive right itself; a player would still be allowed to bring his claim in arbitration, and if he believes he has a claim under state law, the Union would have the discretion to file a grievance on his behalf.[178] In a recent Supreme Court case, the Court allowed a union to waive its statutory right to a judicial forum in age discrimination claims.[179] In the wake of this decision, it appears that the Union could waive its right to the judicial forum in a future CBA, and demand that everything is handled through the arbitration process.

Finally, Congress could listen to Commissioner Goodell and pass federal legislation[180] that protects the collectively bargained for performance-enhancing drug policies of professional sports leagues. This amendment would most likely be narrowly drawn to avoid unintended results. Congress would have to balance the interest of allowing professional sports leagues to be free from interference by state workplace anti-drug laws with the danger of allowing the employers to

176. MINN. STAT. § 181.938 subdiv. 2 (2010).

177. *See generally* Davis v. Pro Basketball, Inc., 381 F. Supp. 1 (S.D.N.Y. 1974); *see also* Erving v. Virginia Squires Basketball Club, 349 F. Supp. 716 (E.D.N.Y. 1972); Kansas City Royals v. MLB Players Ass'n, 532 F. 2d 615 (8th Cir. 1976).

178. Unions are under a duty of fair representation. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

179. 14 Penn Plaza v. Pyett, 129 S. Ct. 1456 (2009) (employees alleged that their employer and the company, 14 Penn Plaza, LLC, that owns the building in which they worked, discriminated against them on the basis of their age, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). The employees are members of Service Employees International Union, Local 32BJ, which negotiated a collective bargaining agreement ("CBA") with the Realty Advisory Board on Labor Relations, Inc. ("RAB"), of which the employer and 14 Penn Plaza are members. The CBA stated that the sole and exclusive remedy for all employment discrimination claims, including those brought under the ADEA, is the union's grievance and arbitration procedure. The issue in this case was whether a union has the power to bargain away its members' rights to litigate employment discrimination claims. The Supreme Court held that a union could waive a statutory right to a judicial forum in age discrimination claims).

180. Karnowski, *supra* note 165, at 1.

have free reign to change their policy to whatever they may choose. For example, the new policy could permit the NFL to suspend a player without a confirmation test or without providing a hearing. In order to prevent states from interfering with the CBAs of professional sports leagues, while at the same time ensuring that the policies have minimum protections of players in place, the federal legislation must be narrowly drawn.

In September 2010, Senator Byron Dorgan introduced the "Clean Sports Protection Act," ("Bill") which would allow drug-testing programs to preempt state law, but only if those drug-testing programs are more likely to detect performance-enhancing drugs.[181] This Bill is the federal legislature's direct response to the *Williams* case. The legislation is limited because it only applies to the steroids policy and not the substance-abuse policy.[182] This approach "allow[s] the NFL to erase the StarCaps loophole without requiring the NFLPA to agree to do so via collective bargaining."[183] If enacted, the Bill would prevent a repeat of the *Williams* situation.

VII. CONCLUSION

The Eighth Circuit's decision in *Williams* did not hinder the Minnesota Vikings and New Orleans Saints from having successful seasons, but it has left employers and professional sports leagues questioning both the power of negotiated CBAs with employees and the enforcement of those CBAs' policies. Now, employers and professional sports leagues are limited to testing procedures and remedies that are permitted by the state law. This frustrates the power of bargaining and the competitive balance that is needed in the context of professional sports. Had the Eighth Circuit in *Williams* either given judicial deference to the arbitrator's decision to suspend the players or preempted the claims under Section 301, the NFL would not be in the troubling situation of being subject to inconsistent state laws. Because of the ramifications of the decision, the Eighth Circuit's holding should be reversed by the Supreme Court. If NFL policies applied, it would give deference to the bargaining process, the CBA resulting from that process, and, ultimately, the arbitrator's decision.

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181. Clean Sports Protection Act, S. 3851, 111th Cong. (2010), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s3851is.txt.pdf (the Bill has been referred to the Committee on Commerce, Science, and Transportation).

182. *Id.*

183. Greg Rosenthal, *Senate bill introduced to prevent another StarCaps case*, NBC SPORTS, Sept. 28, 2010, http://profootballtalk.nbcsports.com/2010/09/28/senate-bill-introduced-to-prevent-another-starcaps-case/.